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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Petitioners,

v.

DONALD MATTHEWS, MORTIMER COVERT,

Respondents.

On Certiorari to The United States Court of Appeals For the Second Circuit

Brief of State of California Amicus Curiae

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THE INTEREST OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

Whether a federal court can, consistent with the Eleventh Amendment to the United States Constitution, require a sovereign state to pay an award of attorneys' fees is a question of fundamental significance to the State of California, as it is to every member of this Republic.

In *Jordan v. Gilligan*, 500 F.2d 701, 704-705 (6 CA; 1974), certiorari denied, 421 U.S. 991, ... S.Ct. ....., 44 L.Ed.2d 481 (1975), the Court of Appeal said:

> "Any award of attorneys' fees, whether against the State [. . .] or its officials, vitally affects the rights and interests of the State in preserving its revenues."[1]

California thus appears, not to do battle with the federal policies which support awards of attorneys' fees generally, but to avoid the threatened competition in its own legislative halls between federal claims for the funding of those federal aims and the legitimate funding priorities established by the needs of its own populace.

ARGUMENT

I. An Award of Attorneys' Fees Is Not a Necessary Attribute to Compliance with a Decree Proper Under Ex Parte Young but Reflects Separate Policy Considerations Which Cannot Override the Eleventh Amendment's Command

Since the ratification of the Eleventh Amendment[2] to the United States Constitution on January 8, 1798, 6 *Annals of Congress* 809 (1798), the relevant parameters of its application or non-application can basically be discerned from just two decisions of this Court: *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); and *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1973).

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1. *See also Employees v. Missouri Public Health Department*, 411 U.S. 279, 286, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), wherein this Court implied that a similar award of attorneys' fees against a state might be too harsh a treatment to be compatible with the "pursuit of a harmonious federalism."

2. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

In *Ex parte Young*, the Court upheld the power of the federal judiciary to enjoin a state official's enforcement of an unconstitutional state statute. Reasoning that "the use of the name of the State to enforce an unconstitutional act . . . is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity," 209 U.S., *supra*, at 159, 28 S.Ct., at 454, 52 L.Ed., at 729, the Court found the Eleventh Amendment not to be a bar to the federal court's prospective action against the state officer.

While the Court employed a patent fiction to reach its conclusion in *Ex parte Young*, that conclusion was vital to the preservation of the federal-state relationship as conceived in the Constitution. As Justice McKenna wrote in *General Oil Co. v. Crain*, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754 (1908), decided the same day as *Ex parte Young*, *supra*,

> "If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation." *General Oil Co. v. Crain*, 209 U.S., *supra*, at 226, 28 S.Ct., at 480, 52 L.Ed., at 763-764.

Edelman v. Jordan, *supra*, on the other hand, faced the question whether the Eleventh Amendment permitted a federal court to impose upon a state a retroactive award of monetary relief.

Holding such an award to be beyond the court's jurisdiction, this Court distinguished its nature from those fiscal consequences to the states which are

> "the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*. . . ." *Edelman v. Jordan*, 415 U.S., *supra*, at 667-668, 94 S.Ct., at 1358, 39 L.Ed.2d, at 675.

In contrast, the Court found the retroactive award to be "in practical effect indistinguishable in many aspects from an award of damages against the State." *Id.*, at 668. Such latter types of awards, of course, have long been held to be prohibited by the Eleventh Amendment. *See, e.g., Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944).

Given the above general pronouncements, it is plain that while the federal court award of attorneys' fees under consideration here falls somewhere in the twilight between the permissibility of the order in *Ex parte Young* and the invalidity of the award condemned in *Edelman, cf. Edelman v. Jordan*, 415 U.S., *supra*, at 667, 94 S.Ct., at 1357, 39 L.Ed.2d, at 675, its true nature, scope and impact preclude its application to the various unconsenting states.

A. ATTORNEYS' FEE AWARDS ARE A DISTINCT JUDICIAL REMEDY, REFLECTING NON-CONSTITUTIONAL POLICY DETERMINATIONS, AND THUS CANNOT BE IMPOSED IN CONFLICT WITH THE ELEVENTH AMENDMENT

To surmount the bar of the Eleventh Amendment, any fiscal impact upon a state treasury imposed by a federal court must be "the *necessary result* of compliance with

decrees which by their terms were prospective in nature." *Edelman v. Jordan*, 415 U.S., *supra*, at 668, 94 S.Ct., at 1358, 39 L.Ed.2d, at 675 (emphasis added). Under such a standard, the award of attorneys' fees under review cannot stand.

We first note the obvious: in making or approving all the countless orders against the states pursuant to the approved principles of *Ex parte Young*, this Court, with but one exception, has not heretofore required any state to pay an attorneys' fee to the prevailing plaintiff.[3] If

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3. The exception, of course, is the summary affirmance of *Sims v. Amos*, 340 F.Supp. 691 (M.D.Ala.) (three-judge court), aff'd mem. 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972), a case often cited by lower courts as authority for an award of attorneys' fees by a federal court against a state. *See, e.g.*, the Second Circuit's opinion in this case, *Fitzpatrick v. Bitzer*, 519 F.2d 559, 571 (2 CA; 1975); *Thonen v. Jenkins*, 517 F.2d 3, 7 (4 CA; 1975); *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1029 (1 CA; 1974), certiorari denied *sub. nom. Director of Civil Service of Massachusetts v. Boston Chapter, N.A.A.C.P., Inc.*, 421 U.S. 910, ... S.Ct. ....., ... L.Ed.2d ..... (1975); *Jordan v. Fusari*, 496 F.2d 646, 651, n. 11 (2 CA; 1974); *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9 CA; 1974); *Gates v. Collier*, 489 F.2d 298, 302 (5 CA; 1973), petition for rehearing en banc granted, 500 F.2d 1382 (5 CA; 1974); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101, n. 11 (N.D.Ca.; 1972); and *Taylor v. Perini*, 503 F.2d 899, 907 (6 CA; 1974) (Edwards, J., dissenting), vacated on other grounds, 421 U.S. 982, 95 S.Ct. 1985, 44 L.Ed.2d 474 (1975). Cases rejecting *Sims v. Amos* as persuasive authority for such an award include *Jordon v. Gilligan*, 500 F.2d, *supra*, 707-708; and *United States v. State of Washington*, 66 F.R.D. 477, 479-480 (W.D.Wash.; 1974). *See also Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31 (3 CA; 1974), vacated on other grounds, 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975), wherein the Third Circuit attributed this Court's failure to overrule its summary affirmance of *Sims v. Amos* in *Edelman* to "inadvertence." *Id.*, 501 F.2d, at 42, n. 7.

There are strong indications that this one exception found in *Sims v. Amos* indeed should not be taken as the Court's ultimate word on the point. Given the absence of any stated reason for this Court's action in *Sims*, the precedential value of that disposition in the face of the constitutional dimensions of the question presented may be considered diminished. *Cf. Edelman v. Jordan*, 415 U.S., *supra*, at 671, 94 S.Ct., at 1359-1360, 39 L.Ed.2d, at 677. And, certainly, we hesitate to afford it dispositive effect in view

compliance with those orders was achieved without the imposition of any attorneys' fees, and we may assume compliance was obtained, it is apparent that an award of attorneys' fees was not a *necessary* prerequisite to such compliance.

More significantly, however, examination of fee awards reveals that their nature is entirely separate from the carrying out of any prospective decree. They are, in fact, a distinct remedy unto themselves, imposed for a variety of non-constitutional policy reasons, none of which bear upon a state's compliance with a decree to enforce constitutionally-based rights.

In *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), this Court had occasion to examine the numerous federal doctrines and provisions which justify the award of attorneys' fees generally. *Id.*, 421 U.S. at 257-263, 95 S.Ct., at ....., 44 L.Ed.2d, at ..... Without repeating that discussion, we discern therefrom the following major policies being advanced by Congress and the federal courts in their allowances of such fees:

a. to recompense a party who incurred expenses to secure a protected right;

b. to spread the cost of litigation among all those who benefitted therefrom, avoiding the unjust enrichment of many and sparing one or a few individuals from shouldering the entire expense;

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of the Court's subsequent decision to hear arguments in this case. Finally, and most importantly, any significance which might have attached to this Court's action in *Sims* was vitiated by its later summary affirmance of *Murgia v. Commonwealth of Mass. Bd. of Retirement*, 386 F.Supp. 179 (D.Mass.; 1974) (three-judge court), aff'd mem. 421 U.S. 972, 95 S.Ct. 1972, 44 L.Ed.2d 464 (1975).

c. to encourage private persons to use the courts to obtain certain rights or to advance particular policies;[4] or

d. to punish a party for unreasonable, vexatious, or obdurate behavior, or for violation of a court order.

The particular policies being advanced by the above bases for awards of attorneys' fees are unrelated to any particular constitutionally-protected right, which rights alone can justify the granting of any relief by a federal court against a state.

Rather, each of the concepts reflects a legislative or judicial determination that one result or course of action among several available alternatives is to be preferred.

For example, this Court's approval of the "common-fund" rationale for awarding attorneys' fees in *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882), was simply a judicial recognition of a particular equitable principle. The Court was under no constitutional compulsion to adopt that principle, but did so apparently because of its belief that the result thereby gained was fairer and thus "better" than another. Had it chosen a different route, we might criticize its choice as unfair or unwise, but we could hardly claim the choice to be unconstitutional.

On examination, all the bases for awarding attorneys' fees fall into the same category: they are but policy choices and, as such, can only be made consistent with the limits set forth in the federal constitution.

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4. Such a purpose undoubtedly lies behind the Congressional enactment of 42 U.S.C.A. § 2000e-5(k), which statute supports the award reviewed here. *Cf., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

Where such a choice would result in an imposition upon the revenues of a non-consenting state, as does the fee award in this case, the clash of that policy decision with the command of the Eleventh Amendment is patent.

B. FEDERAL IMPOSITION OF ATTORNEYS' FEES UPON THE NON-CONSENTING STATES IS UNNECESSARY TO ACHIEVE COMPLIANCE WITH AN OTHERWISE VALID COURT ORDER

Since the non-constitutional policies behind attorneys' fee awards plainly cannot be held to justify the circumvention of the Eleventh Amendment, advocates of the imposition of such fees upon the states have seized upon a more subtle rationale for their position.

It has been contended that, unless attorneys' fees are provided to private parties, few will undertake the litigation to secure their constitutional rights. Thus, it is concluded, awards of such fees are indeed "necessary" to obtain state conformance to federal constitutional standards, and thus they are a permissible effect of a grant of prospective relief, itself valid pursuant to *Ex parte Young*. *See, e.g., Fitzpatrick v. Bitzer,* 519 F.2d, *supra,* at 571; and *Gates v. Collier,* 489 F.2d, *supra,* at 301-302.

The above argument contains several assumptions, however, all of which are critical to its conclusion. The failure of any one of these assumptions requires rejection of the entire thesis. These assumptions include:

a. only private parties can enforce federal constitutional rights against states;

b. only federal forums are available to enforce federal constitutional rights against states; and

c. only by exacting attorneys' fees from the states can the federal judiciary ensure private enforcement of federal constitutional rights.

To state the above premises is to demonstrate their fallacy. As to the first, it is clear the federal government may, consistent with the Eleventh Amendment, act through its own agents to enforce the rights involved. Indeed, the Attorney General of the United States is expressly authorized to enforce against the states the provisions of Title VII of the Equal Employment Opportunity Act, 42 U.S.C.A. § 2000e-5(f), P.L. 92-261, § 4(a), the Act implementing the underlying constitutional right involved in this case. The "necessity" for private enforcement action only appears because Congress has determined, as a matter of policy, not to fund federal enforcement efforts to a sufficient degree, but to rely instead upon private litigants for a portion of the task. *See, e.g.*, House Report No. 92-238, 1972 U.S. Code Cong. and Adm. News 2137, at 2147-2148. No constitutional language dictates such a policy choice nor does any preclude a reversal thereof.[5]

The second assumption, that only the federal courts will provide a forum to those whose federal constitutional rights are impinged upon by states, is belied by the fact that in certain instances Congress has made state courts available to private litigants seeking damages against the states pursuant to federal law. *See Fitzpatrick v. Bitzer*, 519 F.2d, *supra*, at 570-571. Again, the fact that a private litigant seeks relief against a state from a federal court is based on factors unrelated to constitutional requirements.

Finally, as to the last assumption, there are available alternatives to federal court exaction of attorneys' fees for private litigants from non-consenting state defendants. Again, the Equal Employment Opportunity Act provides a solid example.

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5. It is noteworthy that, should the United States itself seek relief against a state, the protection otherwise afforded a state by the Eleventh Amendment would be of no avail. *United States v. Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965).

In 42 U.S.C.A. § 2000e-5(f)(1), "Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." Certainly, under the just-quoted portion of the Act, a state's immunity from an award of attorneys' fees may invoke the federal court's appointment of counsel—at federal expense—for the private litigant.

Harking back to the language of *Edelman*, it is apparent that the fee award in this case is not a *necessary* element of securing a state's prospective compliance with federal law. Other means are available to the federal judiciary to accomplish the same result, but in a manner which would not abrade the delicate federal-state relationship.

The Congressional or judicial determination that a particular approach to enforcement of federal constitutional rights may be more *desirable* than available alternatives cannot justify the federal imposition of attorneys' fee awards upon the states. The constitutional command of the Eleventh Amendment must be respected.

II. There Is No Supreme Court Precedent for the Usurpation of State Sovereignty by the Award of Attorneys' Fees

There remains one final basis which has been claimed as authority for a federal court award of attorneys' fees against a non-consenting state, *i.e.*, this Court's decision in *Fairmont Creamery Co. v. State of Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927). *See, e.g., Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d, *supra*, at 1029; and *Souza v. Travisono*, 512 F.2d 1137, at 1139-1140 (1 CA; 1975).

In *Fairmont*, an award of costs by the Supreme Court against a state was upheld, a result which, standing alone,

would appear to lend support to the *Beecher* court's result. But even assuming, arguendo, that attorneys' fees should be identically treated with the costs involved in *Fairmont*, *see Souza v. Travisono*, 512 F.2d, *supra*, at 1140, that decision of the Supreme Court cannot support the claimed circumvention of the Eleventh Amendment.

Most importantly, the language of *Fairmont* relied upon by the First Circuit in *Beecher* and *Souza* is patent dicta. The true basis for the result in *Fairmont* is found at 275 U.S., *supra*, at 73, 48 S.Ct., at 98, 72 L.Ed., at 169-170, where this Court noted it lacked jurisdiction to hear Minnesota's motion to retax the costs imposed since the judgment for costs had previously become final.

". . . [N]ot content to dispose of the motion on this ground alone," *idem*, the Supreme Court went on to explore the merits of the question. The ensuing rationale, it clearly appears, was wholly unnecessary to the result obtained, and thus lacks the precedential value placed upon it by the First Circuit.

But, even if the *Fairmont* dicta should be considered at all, its irrelevance to the Eleventh Amendment question presented in this case is apparent.

The *Fairmont* court concluded its imposition of costs upon Minnesota was proper, and did so without a single allusion to the constitutional language with which this case is concerned. Instead, the Court emphasized the procedural status of the case before it, noting that the costs incurred were the result of litigation brought "by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States." *Id.*, 275 U.S., at 74, 48 S.Ct., at 99, 72 L.Ed., at 170.

Given this emphasis, and also the dearth of any discussion of the Eleventh Amendment, it is apparent the Supreme

Court in *Fairmont* viewed the case as one falling outside the application of that constitutional requirement.

Such a perspective was supported by precedent. In *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), Chief Justice Marshall reached the identical conclusion. At the time *Cohens* was decided, Marshall, ever the Federalist, perceived the danger to the Republic which would flow from an expansive interpretation of the then-recently enacted Eleventh Amendment. Accordingly, he went to elaborate lengths to describe the writ of error in a manner which would remove it from the literal impact of that Amendment:

> "Under the judiciary act, the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. . . . . Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State. . . . Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing." *Cohens v. Virginia,* 19 U.S. (6 Wheat.), *supra,* at 410, 5 L.Ed., at 407.

From the above, it was a simple task for Marshall then to conclude that the writ of error was not governed by the Eleventh Amendment. *Id.,* 19 U.S. (6 Wheat.), at 412, 5 L.Ed., at 411.

Applying Marshall's rationale in *Fairmont*, the Court's only problem in imposing costs on Minnesota was to overcome the common law sovereign immunity of the state, a different concept than that embodied in the Eleventh Amendment.[6] The balance of its opinion, then, is an exposition of the federal authority for the imposition of costs by the Court, since, under the Supremacy Clause, such authority would override any common law immunity otherwise available to Minnesota.

The *Fairmont* case, even expansively read, thus is not an Eleventh Amendment case at all. At best, it continues a highly artificial view of a particular function of the Court, which view was initially created by Marshall for much the same reasons as the Court in *Ex parte Young*, *supra*, employed another fictional device.

However, in cases like the one before the Court now, the reasoning employed by Marshall in *Cohens*, *supra*, cannot apply. Here, unquestionably, the lawsuit is brought by an individual against the state, and thus, the action falls within the Eleventh Amendment. *See, generally, Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Moreover, specific monetary relief is sought, which relief is payable from the state's treasury, and which would force state officials to adjust their decisions in accordance with the national judiciary's command. *Cf. Land v. Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1946).

Given the above, *Fairmont's* supposed support for a federal award of attorneys' fees against a state is as fallacious as any of the other rationales used to buttress such action.

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6. *See, e.g.*, Note, A Practical View of the Eleventh Amendment —Lower Court Interpretations and the Supreme Court's Reaction, 61 Georgetown L.J. 1473, 1480-1481 (1973).

CONCLUSION

On examination, neither precedent nor logic supports a federal court's award of attorneys' fees against a non-consenting state. Rather, such conduct demonstrates a classic and impermissible involvement of the national judiciary in the revenue decisions of a sovereign entity.

As such, the decision of the Second Circuit reviewed here, insofar as it purports to assess any fees against the State of Connecticut, should be reversed.

Respectfully submitted,

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